Office of Chief Counsel Internal Revenue Service

memorandum

CC:SB:2:NEW:TL-N-5732-00 RWMopsick

date:

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to: North Florida Appeals Office 2203 North Lois Avenue Suite 812 Tampa, Florida 33607 Attn. Appeals Officer Hazelann Pace

from: Associate Area Counsel, New Jersey District

subject: Taxability of Payments Made Pursuant to A New Jersey Pre-Nuptial Agreement

This has reference to the memorandum dated October 5, 2000 from Appeals Officer Hazelann Pace by which she asks for advice with regard to the above-referenced subject.

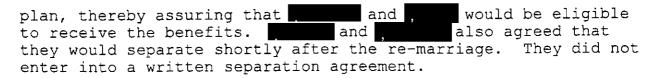
ISSUE

Whether a pre-nuptial agreement executed under New Jersey law constitutes a "divorce or separation instrument" under I.R.C. §71(b) so as to allow deduction of a payment made pursuant to such agreement.

FACTS

and were married in . One child, was born of the marriage. On and were divorced in a New Jersey court. The divorce judgement required alimony of per week, and (b) to maintain a life insurance policy for as well as a survivor's benefit insurance policy for as well as a survivor's benefit insurance policy for as well as a survivor's discovered, and would no longer be entitled to the court-ordered life and survivor benefits since he and were no longer husband and wife.

To resolve this problem, and agreed to remarry with the understanding that the marriage would last only for so long as was necessary for to vest in his retirement



Before they remarried, and on on entered into a comprehensive pre-marital agreement under

New Jersey law. The agreement provides that the parties adhere
to the divorce judgement's support provisions, specifically, that

continue making payments for support.

and separated immediately after the remarriage but continued to file jointly through the separated by the pre-nuptial agreement. For and and filed separately, and deducted the payments under I.R.C. \$215.

You have asked whether the payments made pursuant to the pre-nuptial agreement after separation but prior to the court order are deductible as alimony by

<u>Short Answer</u>: No. There was no written separation agreement into which were incorporated the payment provisions of the pre-nuptial agreement.

LEGAL AUTHORITIES

I.R.C. \$71(a) provides that gross income includes amounts received as alimony or separate maintenance payments. Section \$215(a) provides for a deduction of such alimony payments.

Section 71(b) defines the term "alimony or separate maintenance payment" as any payment in cash if such payment is received by (or on behalf of) a spouse under a divorce or separation instrument. Section 71(b)(2) defines the term "divorce or separation instrument", in pertinent part, as (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree, and (B) a written separation

agreement.

Treasury Regulation Section 1.71-1(a)(2) provides that where the husband and wife are separated and living apart and do not file a joint income tax return for the taxable years, paragraph (2) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her pursuant to a written separation agreement executed after August 16, 1954. The periodic payments must be made under the terms of the written separation agreement after its execution and because of the marital or family relationship.

To illustrate this rule, the Regulation goes on to present the following example in which it is assumed that the husband and wife file separate income tax returns on the calendar year basis:

During 1945, H and W enter into an antenuptial agreement, under which, in consideration of W's relinquishment of all marital rights (including dower) in H's property, and, in order to provide for W's support and household expenses, H promises to pay W \$200 a month during her lifetime. years after their marriage, W sues H for divorce but does not ask for or obtain alimony because of the provision already made for her support in the antenuptial agreement. Likewise, the divorce decree is silent as to such agreement and H's obligation to support W. Section 71(a) does not apply to such a case. If, however, the decree were modified so as to refer to the antenuptial agreement, or if reference had been made to the antenuptial agreement in the court's decree or in a written instrument incident to the divorce status, section 71(a)(1) would require the inclusion in W's gross income of the payments received by her after the decree. Similarly, if a written separation agreement were executed after August 16, 1954, and incorporated the payment provisions of the antenuptial agreement, section 71(a)(2)would require the inclusion in W's income of payments received by W after W begins living apart from H, whether or not the divorce decree was subsequently entered and whether or not W was living apart from H when the separation agreement was executed, provided that such payments were made after such agreement was executed and pursuant to its terms. As to including such payment in W's income, if made by a trust created under the antenuptial agreement, regardless of whether referred to in the decree or a later instrument, or created pursuant to the written separation agreement, see section 682 and the regulations thereunder.

Thus, unless the antenuptial agreement is referred to or incorporated in a divorce decree or separation agreement, § 71(a) will not apply.

CONCLUSION

Pursuant to the above regulation, may not deduct alimony payments under the pre-nuptial agreement since provision for such payments was not incorporated in any divorce decree or separation agreement. Moreover, the absence of a written separation agreement makes irrelevant the fact that the antenuptial was prepared under New Jersey law.

Our file in this matter is now closed. Should you have further questions, please call the undersigned at (973) 645-2627.

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cc: Advisory Opinion, TL